Supreme Court, U.S.
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No. ____

In The
Supreme Court of the United States

JOEL TENENBAUM,

Petitioner,

v.

SONY BMG MUSIC ENTERTAINMENT;
WARNER BROS. RECORDS, INC.;
ATLANTIC RECORDING CORPORATION;
ARISTA RECORDS, LLC;
UMG RECORDINGS, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Are federal courts constitutionally obligated by the First and Fifth Amendments to reasonably facilitate public access to judicial proceedings by all available means, including use of the Internet and other electronic broadcasting, or is the right of public access restricted to those who can afford the travel and time costs of attending the proceedings in person or the price of copies of official transcripts and notes, while relegating everyone else to such press reports and other second-hand accounts as may be available?

2. Does the absolute prohibition of Internet and other electronic broadcasting of any open-court sessions of civil actions in federal district courts violate the First and Fifth Amendment rights of the general public and civil litigants to public access to judicial proceedings?

3. Where the court below accepted the district court judge's finding that Internet broadcasting of the oral arguments in the underlying civil action would reasonably and effectively facilitate public access to the judicial proceedings, does application of the total broadcasting prohibition in this case violate the First and Fifth Amendment public-access rights of the public and petitioner?

4. In totally prohibiting a district court judge from exercising any discretion to facilitate exercise of the constitutional rights of public access by means of Internet or other electronic broadcasting of open-court sessions in civil cases, does the ruling below impermissibly restrict the judicial power vested in federal district court judges by the Constitution and creational statutes?

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OPINIONS BELOW

The opinion and order of prohibition issued by the First Circuit Court of Appeals is reported at *In re SONY BMG Music Entertainment*, 564 F.3d 1, April 16, 2009, reproduced in the Appendix at 1a–21a. The now prohibited order of the district court is reported at *Capitol Records, Inc. v. Alaujan*, 593 F.Supp.2d 319 (D. Mass. 2009), reproduced in the Appendix at 22a–31a.

JURISDICTION

The judgment of which Petitioner Tenenbaum seeks review was entered on April 16, 2009 (see above). Petitioner Tenenbaum's petition for a rehearing *en banc* of the judgment was denied on April 30, 2009; the order is reproduced in the Appendix at 32a.

The jurisdiction of this Court is therefore invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the First and Fifth Amendments to the United States Constitution, reproduced in the Appendix at 32a.

STATEMENT OF THE CASE

Petitioner Joel Tenebaum asserts that the First Circuit's total ban on Internet broadcasting[1] of open-court sessions of civil actions in federal district courts

on its face and as applied violates the First and Fifth Amendment rights of public access to judicial proceedings. Petitioner invokes the public-access rights of the general public and of himself as a defendant in the underlying civil action.[2]

Petitioner Joel Tenenbaum claims the constitutional right to an open trial before the people. On behalf of the people, he asserts their right of public access to the proceedings.

In 2002 a consortium of record companies began filing infringement actions under the Copyright Act, 17 U.S.C. § 101 *et seq.*; 28 U.S.C. § 1331; and 28 U.S.C. § 1338(a); they alleged that individual noncommercial defendants (many of whom were students) had illegally used file-sharing software to download and disseminate copyrighted songs without paying royalties. On December 23, 2008, Petitioner Tenenbaum (one of the persons whom the record companies had sued), moved to permit Courtroom View Network (CVN) and the Berkman Center for Internet & Society of Harvard University[3] to open public internet access to open-ses-

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[1] For sake of convenient reference, "internet broadcasting" subsumes all types of media (e.g., television, radio) and formats (e.g., audio, visual, live, pre-recorded) of electronic broadcasting.

[2] Because the public-access rights of the general public and civil litigants are aligned in this case, unless otherwise specified our argument proceeds as if only one-set of right-holders is involved.

[3] CVN narrowcasts to remote persons, typically lawyers and corporations wanting to follow a trial but not wanting to physically attend. In this case CVN was to narrowcast the audiovisual coverage to the website of the Berkman Center for Internet & Society, which was to make the recording publicly available for all via its website.

sion hearings on dispositive, non-evidentiary motions that were initially scheduled for January 22, 2009.[4] At this hearing, Petitioner Tenenbaum's challenges to the constitutionality of the Copyright Act as it is being applied to him and the Respondents' challenges to the sufficiency of Tenenbaum's counterclaims were to be heard.

Respondents (plaintiffs-petitioners below) objected to Internet broadcasting of the oral arguments solely on the ground that the district court lacked the power to allow any electronic broadcasting.

Based on this record and citing the evident public interest in the litigation, the district court granted the motion to allow Internet broadcasting of the oral arguments. *Capitol Records*, 593 F.Supp.2d at 324-25 (Appendix at 27a *et seq.*). Regarding the question of judicial power, the court relied on the local rule of the District Court, D. Mass. R. 83.3. Under this Rule recordings and broadcasting of judicial proceedings are prohibited "[e]xcept as specifically provided in these rules *or* by order of the court." (Italics supplied.) The local rules specifically except from the prohibition recordings and broadcasting used to facilitate three enumerated purposes: preparation of stenographic transcripts, preservation of evidence and court records, and memorialization of investiture and other ceremonies. The district court read the "or by order of the court" phrase in R. 83.3 as supporting the exercise of discretion beyond the enumerated purposes to facilitate the constitutional rights of public access to

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[4] The district court subsequently stayed the hearing to permit review. *See Order Re: Motion to Stay*, January 20, 2009 (unpublished), reproduced in the Appendix at 32a.

judicial proceedings by allowing Internet broadcasting of oral arguments on dispositive motions in the underlying civil action.

Respondents immediately sought and obtained an extraordinary writ of prohibition from the United Sttes Court of Appeals for the First Circuit to stop the opening of the district court hearing to public internet access. The lower court declared the district court's reading of Rule 83.3 "palpably erroneous." On the lower court's interpretation, Rule 83.3 totally prohibited any recording and broadcasting of district court proceedings except for the specifically enumerated purposes. Rather than supporting the exercise of discretion to facilitate the constitutional right of public access, the court ruled that the "or by order of the court" phrase in Rule 83.3 added nothing. Finally, the First Circuit dismissed the constitutional right of public access, restricting the concept of "access" to physically "attend[ing] federal court proceedings." This "*Richmond Newspapers* right is not in jeopardy," the court concluded, "[b]ecause there is no hint here that any portion of proceedings will be closed to the public." While acknowledging that the "new technology ... may call for replotting some boundaries," though apparently not so far as to allow viewing of proceedings "remotely on a computer screen," the court essentially refused to permit the district court to undertake any such effort.[5]

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[5] Petitioner's motion for rehearing *en banc* was denied. *See Order of Court*, April 30, 2009 (unpublished), reproduced in the Appendix at 35a.

REASONS FOR GRANTING THE PETITION

This case presents the Court with the first opportunity to address a systemically central problem: to what extent and by what principles should federal courts facilitate the constitutional right of public access to judicial proceedings by harnessing the Internet's extraordinary capacity to disseminate information among the People? The constitutional ideal of government-of-and-by-the-people is hollow when the people lack real and practical means to inform themselves about matters of public interest and concern that transpire in official forums, in particular, in judicial proceedings. Without denigrating the lower court's adherence to the "venerable right of members of the public to attend federal court proceedings," the ruling below renders the right of public access virtually meaningless for the vast majority of the people, however great the public interest in and importance of the matters in controversy.

By restricting the right of public access to courtroom attendance, or by default, to official transcripts or news and other second-hand reports, the ruling below perpetuates physical, wealth, and other arbitrary barriers against public access that excludes all but a select few from gaining unmediated and unabridged information about the process as well as substance of American judicial proceedings. Internet broadcasting now makes it possible to lower, if not entirely eliminate, those barriers. The essence of the public access right asserted here is that the under the Constitution, the federal courts possess and must exercise discretion to take advantage of the "new technology" as far

as necessities of judicial economy, order, and fairness permit.

Never since the advent of modern First and Fifth Amendment jurisprudence has this Court accepted a total ban, such as that imposed by the ruling below, on First and Fifth Amendment rights of public access to information from judicial and other public forums. Beyond allowing those physically in the courtroom (given adequate space, seats, and acoustics), the ruling allows no one else to hear the parties debate the merits of the legal issues in contest. This constraint on public access is arbitrary; there is no reason for it and none is given, just that a judge-made rule requires it. This rule is sweeping. It absolutely forecloses all broadcasting of open sessions in civil cases, regardless of how the court might tailor the type and format of the dissemination — whether simultaneous or delayed, gavel-to-gavel or selective, whether to arguments on motions, jury selection, witness examination or verdict, whether visual or strictly audio. This flat ban on public access ignores the unobtrusive and efficient nature of current recording technology, in this instance using already installed courtroom equipment. Indeed, the arbitrariness of the prohibition barring the district court from allowing Internet broadcasting of oral

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[6] *See In re SONY BMG Music Entertainment*, 564 F.3d, at 11, reproduced in the Appendix at 19a; First Circuit Internal Operating Procedure VIII(E); *Transcripts and Recordings of Oral Arguments*, available online at *http://www.supremecourtus.gov/oral_arguments/availabilityoforalargumenttranscripts.pdf*. The oral arguments on the writ of mandamus or prohibition to block the Internet broadcasting of the oral arguments in the district court are available on the Internet at *http://www.ca1.uscourts.gov/files/audio/09-1090.mp3*.

arguments on dispositive motions in the underlying civil action is underscored, as Judge Lipez notes in his concurring opinion below, by the fact that the very same arguments, if and when presented to the First Circuit on appeal, would be broadcast over the Internet as a routine matter—as they would in some form if the matter reached this Court.[6]

To be sure, the main thrust of this Court's rulings establishing the right of public access to judicial proceedings results from efforts of the press to attend judicial proceedings in person. Seeking such access makes sense for those whose job it is to cover the courts. But the right of public access cannot depend on the interests of the media, or, indeed, any intermediaries, because those interests will not necessarily, for reasons of money, politics, staffing or otherwise, adequately represent the public's interests in receiving complete, consistent, and reliable coverage. The underlying copyright litigation provides a clear example of why media reportage would carry with it at least the appearance of bias. But even at its best, receipt of second-hand reports can never replace (although they may supplement) receipt of direct, unmediated audio or visual renditions of the actual proceedings.

Thus the court below erred in restricting the "*Richmond Newspapers* right" to physical presence in court. The Court's decision was a "watershed case," as Justice Stevens noted; "never before" had the Court accorded any constitutional protection to "the acquisition of newsworthy information," and, most particularly, to "access to information about the operation of their government, including the Judicial Branch." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555,

582, 584 (1980). Indeed, Richmond Newspapers was at the core of the transformation in First Amendment law worked by *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) that made public discussion of government activity the keystone of our constitutional design for democratic governance. As the Court explained in *Sullivan*, the "central meaning of the First Amendment" derives from its role in ensuring the conditions of self-government. *Id.* at 273 (citations omitted). "[T]he Constitution created a form of government under which '[t]he people, not the government, possess the absolute sovereignty.' The structure of the government dispersed power in reflection of the people's distrust of concentrated power, and of power itself at all levels." *Id.* at 274 (citation omitted). This necessitated an altogether "'different degree of freedom'" as to discussion about government than had previously existed prior to the founding of the Republic. *Id.* at 275.

Sullivan's protection and promotion of discussion about government affairs implies the public right and entitlement to receive information about government. "[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978); *accord, e.g., Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972) ("In a variety of contexts this Court has referred to a First Amendment right to 'receive information and ideas.'") (citation omitted).

A trial is more than a demonstrably just method of adjudicating disputes and protecting rights.

Knowledge of court proceedings is indispensable to public discussion. It plays a pivotal role in the entire judicial process, and, by extension, in our form of government and our culture of law. Under our system, judges are not mere umpires. In the judicial sphere, judges are law administrators and law makers — a coordinate branch of government. While individual cases turn upon particularities between parties, court rulings impose official and practical consequences upon members of society at large. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 595 (1980) (Brennan J. concurring).

Two years after *Richmond Newspapers*, the Supreme Court struck down a *per se* ban on access to all trials involving allegations of sexual offenses committed against minors. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605 (1982), noting that the right recognized in *Richmond Newspapers* "ensure[s] that this constitutionally protected 'discussion of governmental affairs' is an informed one". "Implicit in this structural role is not only 'the principle that debate on public issues should be uninhibited, robust, and wide-open,' but also the antecedent assumption that valuable public debate—as well as other civic behavior—must be informed. The structural model links the First Amendment to that process of communication necessary for a democracy to survive, and thus entails solicitude not only for communication itself, but also for the indispensable conditions of meaningful communication." *Richmond Newspapers*, 448 U.S. at 587-88 (Brennan, J., concurring) (quoting *Sullivan*, 376 U.S. at 270) (footnotes omitted; emphasis added).

CONCLUSION

Internet now enables the members of the public to come freely into court to attend and hear and witness and learn for themselves what is going on. Total prohibition of public access by all technological means other than stenographic transcript is unnecessary, unwise, unconstitutional, and radically out of step with the current needs of our citizenry and our nation.

For the reasons foregoing, Petitioner Tenenbaum respectfully requests that the Court grant this petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

564 F.3d 1

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

IN RE SONY BMG MUSIC ENTERTAINMENT ET AL., PETITIONERS.

No. 09-1090.
Heard April 8, 2009.
Decided April 16, 2009.

COUNSEL

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Jonathan Sherman, with whom Dean Kawamoto, Melissa Felder, and Boies, Schiller & Flexner LLP were on brief, for Courtroom View Network, amicus curiae.

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Before TORRUELLA, SELYA and LIPEZ, Circuit Judges.

OPINION

SELYA, Circuit Judge.

This mandamus proceeding requires us to address a question of first impression: does a federal district judge have the authority to permit gavel-to-gavel webcasting of a hearing in a civil case?[1] The district court thought that it had that authority. *Capitol Records, Inc. v. Alaujan*, 593 F.Supp.2d 319, 324-25 (D.Mass. 2009). After careful consideration, we hold that a local rule, applicable in this case, when read in conjunction with an announced policy of the Judicial Conference of the United States and a resolution of the First Circuit Judicial Council, precludes such an action. Accordingly, we forbid enforcement of the challenged order and remand for proceedings consistent with this opinion.

I. BACKGROUND

Both the underlying case and the challenged order implicate nascent technologies. To furnish context

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[1] "Narrowcasting" and "webcasting" are two different things. Narrowcasting is the recording and live transmission of ongoing events over the Internet to a selected audience. Webcasting is the recording and live transmission of ongoing events over the Internet to a broad, undefined audience. Here, Courtroom View Network proposes to record and transmit the proceedings to a Harvard Law School site (narrowcasting) from which the proceedings will be streamed to a broader, undefined audience (webcasting). The district court's order sanctions this procedure.

Despite the technical difference between narrowcasting and webcasting, we use the terms interchangeably for ease in exposition.

to the latter, we sketch the factual background of the former.

Some time ago, certain record companies began to file infringement actions under the Copyright Act, 17 U.S.C. § 501, alleging that individual defendants (many of whom were students) had illegally used file-sharing software to download and disseminate copyrighted songs without paying royalties. This proceeding arises out of a consolidated set of such lawsuits. In those cases, an array of record companies, including the petitioners here—Sony BMG Music Entertainment, Warner Bros. Records, Inc., Atlantic Recording Corporation, Arista Records, LLC, and UMG Recordings, Inc.—sued a number of individuals as putative copyright infringers.

On December 23, 2008, the respondent, Joel Tenenbaum (one of the persons whom the record companies had sued), moved to permit Courtroom View Network to webcast a non-evidentiary motions hearing that was scheduled for January 22, 2009. The district court, citing the keen public interest in the litigation, granted the motion over the objection of the record company plaintiffs. *Capitol Records*, 593 F.Supp.2d at 324-25.

The petitioners reacted to this order by asking this court to grant a writ of mandamus or prohibition. They argued, among other things, that (with certain exceptions not applicable here) Rule 83.3 of the Local Rules of the United States District Court for the District of Massachusetts prohibited webcasts of civil proceedings. As a supporting argument, they noted that a stated policy of the Judicial Conference of the United States advocated a ban on the use of recording

devices in federal courtrooms (other than for the preservation of trial evidence and the like). We invited the respondent to reply to the petition, accepted amicus briefs,[2] and assigned the matter for oral argument.

In a cooperative spirit, the district court stayed its narrowcasting order pending this court's review. The motions hearing is currently scheduled to take place on April 30, 2009.

II. APPELLATE JURISDICTION

We ordinarily do not entertain arguments raised by amici and not by parties.[3] *See Lane v. First Nat'l Bank*, 871 F.2d 166, 175 (1st Cir. 1989). Here, however, that precept does not apply. When an issue relates to subject-matter jurisdiction, we are duty bound to address the issue even if the parties have eschewed it. *See Cabán Hernández v. Philip Morris USA, Inc.*, 486 F.3d 1, 5 (1st Cir. 2007). As we explain below, this is such a case.

The issue is this: some of the amici contend that

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[2] We also received and placed on file a letter dated January 29, 2009 from Congressman William D. Delahunt. We greatly appreciate the insights offered by the amici and by Representative Delahunt.

[3] To be sure, the respondent purports to "adopt" all the arguments set out in the amicus briefs without making the arguments himself. But the respondent makes only a cursory, broad-brush allusion to this effect. We have held that this type of generalized reference is insufficient to place the putative adopter's weight behind the argument. *See R.I. Dep't of Envtl. Mgmt. v. United States*, 304 F.3d 31, 47 n. 6 (1st Cir. 2002); *see also Mass. Food Ass'n v. Mass. Alcoholic Bev. Control Comm'n*, 197 F.3d 560, 568 (1st Cir. 1999).

narrowcasting (and, thus, the challenged order) does not threaten the petitioners with any irreparable harm. On that basis, they posit that relief in the nature of a prerogative writ is unavailable. *See, e.g., In re United States*, 426 F.3d 1, 5 (1st Cir.2005) (explaining that supervisory mandamus is traditionally available where judicial power has been exceeded, there is a threat of irreparable harm, and the underlying order is palpably erroneous); *United States v. Horn*, 29 F.3d 754, 769 (1st Cir. 1994) (same). Because this argument is couched in jurisdictional terms, we must confront it.

Having reached the issue, we can dispatch it with ease. The jurisdictional argument, whatever its provenance, is without merit.

This case does not involve our general mandamus jurisdiction but, rather, fits within the contours of our advisory mandamus jurisdiction. Under that rubric, we may entertain a petition that "presents a systemically important issue as to which this court has not yet spoken." *In re Atlantic Pipe Corp.*, 304 F.3d 135, 140 (1st Cir. 2002) (citing *In re Prov. Journal Co.*, 293 F.3d 1, 9 (1st Cir. 2002)).[4] The power of a district court to order narrowcasting of a hearing in a civil case is such an issue: it is systemically important and rife with implications for the public interest. In the absence of definitive guidance from this court, the issue is increasingly likely to recur within the district

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[4] Advisory mandamus is different than supervisory mandamus. Supervisory mandamus "is used when an appellate court issues the writ to correct an established trial court practice that significantly distorts proper procedure." *Horn*, 29 F.3d at 769 n. 19.

courts of this circuit. These circumstances counsel in favor of an exercise of our advisory mandamus jurisdiction. *See, e.g., In re Sterling-Suarez*, 306 F.3d 1170, 1172 (1st Cir. 2002).

In making this determination, we are cognizant that prerogative writs are strong medicine and, as such, should be dispensed sparingly. In re Pearson, 990 F.2d 653, 656 (1st Cir.1993). But even while subscribing to that tenet, we believe that this is an appropriate case in which to consider granting the writ. Both the rapidity of technological change and the widespread interest that this proceeding has attracted argue persuasively for a prompt and authoritative resolution of the systemically important issue that lies at the epicenter of this dispute.

Our conclusion that this case falls within the compass of advisory mandamus answers the jurisdictional question. When advisory mandamus is in play, a demonstration of irreparable harm is unnecessary. *In re Sterling-Suarez*, 306 F.3d at 1172. It follows inexorably that we have jurisdiction over this petition.

III. ANALYSIS

Our task here is limited to the use of webcasts in federal civil proceedings. All forms of broadcasting are expressly proscribed in federal criminal cases, see Fed.R.Crim.P. 53, but that prohibition does not apply here.

In order to determine whether webcasts of civil proceedings are permissible in a federal district court, the logical starting point is the district court's local rules. Here, there is a controlling rule: Local Rule 83.3

of the United States District Court for the District of Massachusetts. The text of that rule is reprinted in Appendix A.

In the court below, the district judge interpreted this rule as creating a discretionary catchall exception to the rule's general prohibition against the broadcasting of court proceedings. This interpretation would allow a district judge in an individual case to determine, as a matter of discretion, whether to permit the broadcasting of all or any part of the proceedings. That discretion would have no text-based restrictions. In that sense, it would be limitless.

The district judge in this case made exactly that kind of ad hoc, case-specific determination. The petitioners vigorously contest the expansive construction of the rule that underlies this free-flowing discretion.

We are reluctant to interfere with a district judge's interpretation of a rule of her court, especially one that involves courtroom management. *See, e.g.*, *Sánchez-Figueroa v. Banco Popular*, 527 F.3d 209, 213 (1st Cir. 2008), *cert. denied*, --- U.S. ----, 129 S.Ct. 1328, --- L.Ed.2d ---- (2009). Our standard of review reflects this deferential approach: the "application of a district court's local rule[s] is reviewed for abuse of discretion" but with "a special degree of deference." *Crowley v. L.L. Bean, Inc.*, 361 F.3d 22, 25 (1st Cir.2004).

Be that as it may, deference cannot be equated with a total abdication of an appellate court's responsibility to undertake a meaningful review of a lower court decision. Here, we think that the limits of the district judge's discretion were exceeded; her interpretation of Local Rule 83.3 is unprecedented and, in our view, palpably incorrect.

To begin, the district court's interpretation of the local rule renders subsection (c) of that rule wholly superfluous. If, as the court's discussion suggests, a district judge has wide-ranging discretion to permit civil proceedings to be broadcast, there would be no reason for the inclusion of a proviso which, like subsection (c), states that the court may permit broadcasting in certain enumerated instances (e.g., during ceremonial proceedings, for the preservation of evidence, for perpetuation of a record). It is a familiar canon of construction that every word and phrase in a statute or rule should, if possible, be given effect. *See, e.g., Aguilar v. United States ICE*, 510 F.3d 1, 10 (1st Cir. 2007); *United States v. Ven-Fuel, Inc.*, 758 F.2d 741, 751-52 (1st Cir. 1985). We think that canon has great force here.

The respondent's principal riposte is that a narrower interpretation of Rule 83.3, one that effectively limits a district judge's discretion to a few enumerated types of occurrences, adds words to the rule. This argument rests on the premise that if the drafters intended to restrict the broadcasting of civil proceedings to those settings, the phrase "or by order of the court" would in all likelihood have been cabined further, such as by adding a subordinate clause like "as permitted in subsection (c) below."

That argument demands too much of the rule's drafters. Without any additional restriction, the narrower interpretation yields a sensible and coherent construction of the rule, with all of its parts fitting seamlessly together. This construction is fully consistent with the title of the rule's first subsection, which reflects an intention broadly to prohibit the "[r]ecord-

ing and [b]roadcasting" of civil proceedings. D. Mass. R. 83.3(a). A court may consider a rule's title in fixing its meaning, see *E. Mt. Platform Tennis, Inc. v. Sherwin-Williams Co.*, 40 F.3d 492, 499 (1st Cir. 1994) (stating a similar principle with respect to statutory construction), and we deem it appropriate to do so here.

The structure of Rule 83.3 also favors a narrow interpretation. After formulating a broad prohibition, the rule sets out two exceptions, followed by a reaffirmation of the overall prohibition. The first exception-"[e]xcept as specifically provided in these rules"-refers to such things as voice recordings by court reporters and the use of dictation equipment in the clerk's office. Characteristically, these situations are not subject to pre-approval by the district judge.

The second exception—"by order of the court"—refers to the discretionary orders described in subsection (c); that is, orders relating to the preservation of evidence, the perpetuation of records, and the communication or memorialization of investitive, ceremonial, or naturalization proceedings. Authorization of actions in these situations requires specific approval by the district judge on a case-by-case basis. The more expansive construction favored by the district judge would blur these lines.

Given the structure of the rule as a whole, it is

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[5] The decision in *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 122 S.Ct. 2045, 153 L.Ed.2d 82 (2002), is not to the contrary. There, the Court interpreted the term "may include" expansively, in part because the "statutory language suggesting exclusiveness [was] missing...." *Id.* at 81, 122 S.Ct. 2045. Here, the rule contains prohibitory language indicating that the discretion afforded by the rule is limited.

logical to conclude that the phrase "by order of the court" does not create a free-floating bubble of discretion but, rather, is confined to those situations set out in subsection (c).[5]

The respondent and the amici rely on the practice in two other districts. Specifically, they advert to the allowance of webcasting by district courts in those districts. In our view, this analysis is beside the point. Both of the courts to which we have been referred permit webcasting under a local rule, common to the two districts-two out of the ninety-four districts in the federal system-that differs substantially from D. Mass. R. 83.3. That exogenous rule, as interpreted locally, allows the broadcasting of proceedings on order of a district judge. *See* S.D.N.Y. R. 1.8; E.D.N.Y. R. 1.8; *see also In re Zyprexa Prods. Liab. Litig.*, No. 04-MD-1596, 2008 WL 1809659, at *1 (E.D.N.Y. Mar. 4, 2008). Because Local Rule 83.3 contains no comparable grant of unbounded discretion, the practice in those courts does not bolster the respondent's cause.[6]

We add, moreover, that a narrow interpretation of Local Rule 83.3 is strongly supported by a policy adopted by the Judicial Conference of the United States. The Judicial Conference is the principal policymaking body for the federal courts. Although the Confer-

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[6] At oral argument, some counsel suggested that the routine use of broadcasting techniques to allow viewing of court proceedings in "overflow rooms" within the courthouse opens the door for webcasting. We believe that such usages, within the courthouse and wholly under the control of the court, are easily distinguishable from webcasting. A real extension of the physical dimensions of the courtroom within the courthouse is materially different than a virtual extension of the courtroom to include a limitless outside audience located throughout the world.

ence's policies are generally not binding *ex proprio vigore* on individual district courts, those policies are at the very least entitled to respectful consideration. *United States v. Merric*, 166 F.3d 406, 412 (1st Cir. 1999). In other words, when the Judicial Conference promulgates a policy, that policy, even if not binding in the strictest sense, is not lightly to be discounted, disregarded, or dismissed.

So it is here. In October of 1988, the Judicial Conference launched an investigation into the advisability of allowing cameras in the courtroom. *See Report of the Proceedings of the Judicial Conference of the United States* (Report), Mar. 14, 1989, at 34. Pilot programs were inaugurated in several courts (including the District of Massachusetts).[7] When the dust settled, the Judicial Conference concluded "that the intimidating effect of cameras" in the courtroom presented "cause for concern." Report, Sept. 20, 1994, at 46. The Conference previously had adopted a policy hostile to the use of cameras in the courtroom at about the same time as the District of Massachusetts adopted Local Rule 83.3 (in September of 1990).

Then, it adopted a slightly modified version of the policy in 1996. The Conference published that iteration of the policy in the *Guide to Judiciary Policies*

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[7] To implement the pilot program, the United States District Court for the District of Massachusetts adopted Local Rule 83.3.1 (now expired). That "pilot program" rule was adopted simultaneous with Local Rule 83.3 (albeit with a later effective date). This sequence of events reinforces our interpretation of Local Rule 83.3, as there would have been no need for the adoption of a separate "pilot program" rule if the district court had unbounded discretion to allow telecasting and recording.

and Procedures (Guide), Vol. 1, Ch. 3, Pt. E.3. This version of the policy, which remains in effect, is reprinted in Appendix B.

The commentary to the policy is instructive. It leaves no doubt but that, apart from the enumerated exceptions, "the Conference policy does not authorize the contemporaneous photographing, recording, or broadcasting of proceedings from the courtroom to the public beyond the courthouse walls." *Id.* Pt. E.4. To emphasize this point, the commentary adds that "[t]he Judicial Conference remains of the view that it would not be appropriate to require ... non-ceremonial proceedings to be subject to media broadcasting." Id.

The publication of the policy in the Guide is itself significant. The Guide "is the official medium by which direction as to courtroom procedures and other information are provided to the Federal Judiciary in support of its day-to-day operations." *Kitzmiller v. Dover Area Sch. Dist.*, 388 F.Supp.2d 484, 486-87 (M.D.Pa.2005). It also codifies the policies that are approved by the Judicial Conference of the United States.

In construing Local Rule 83.3, the Judicial Conference's unequivocal stance against the broadcasting of civil proceedings (save for those few exceptions specifically noted in the policy itself), is entitled to substantial weight. A narrow interpretation of the local rule is consistent with this policy. Conversely, an expansive interpretation of the local rule is at war with the policy. Under these circumstances, we believe that the district court, institutionally, would construe its rule to avoid a head-on clash with the national standard. In all events, we interpret the local rule that

way.

A second source of support for a narrow interpretation of Local Rule 83.3 derives from the archives of the First Circuit Judicial Council. Some background is needed to put the circuit council's action into perspective.

28 U.S.C. § 2071 governs the rulemaking power of the district courts. Any rule prescribed by a district court "shall remain in effect unless modified or abrogated by the judicial council of the relevant circuit." Id. § 2071(c)(1). The commentary to the Judicial Conference's policy on broadcasting "urges" circuit councils to adopt measures reflecting the Conference's flat prohibition of broadcasting and to abrogate any district court rule antithetic to that policy.

In furtherance of the Judicial Conference's exhortation, the First Circuit Judicial Council adopted a resolution in June of 1996. The text of the resolution is reprinted in Appendix C.[8]

The aim of the resolution is explicit: the broadcasting of court proceedings is prohibited. That aim is fully consistent with Local Rule 83.3 as we interpret it.

The respondent and the amicus Courtroom View Network assert that the resolution is impuissant because it was passed without either prior notice or an opportunity for public comment. *See* 28 U.S.C. § 332(d)(1). The record is unclear as to whether there was no-

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[8] Due to an indexing problem and through no fault of the parties or the district judge, no reference was made to this resolution in the lower court. We rectified this oversight and issued a supplemental briefing order to enable the parties and the amici to submit their views about it.

tice and comment. Assuming for argument's sake that there was none, the assertion nonetheless misses the mark.

The circuit council reviewed Local Rule 83.3. It obviously read the local rule as we read the rule today. That review presumably was conducted pursuant to 28 U.S.C. § 332(d)(4), which mandates that a circuit council "shall periodically review" the local rules of the district courts within the circuit and "modify or abrogate any such rule" where necessary. There is no requirement that the results of such a review must be put out for public comment if the review itself does not purpose to modify or abrogate the rule(s) reviewed. The council's resolution in this instance did not seek to modify or abrogate any local rule but, rather, endorsed existing practice in the districts within the circuit (including the District of Massachusetts). It follows that the passage of the resolution did not require prior notice, an opportunity for public comment, or any exercise of the circuit council's powers under section 332(d)(1).[9]

We add a coda. At the very least, the resolution unambiguously declares the sentiment of the circuit

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[9] The respondent and the amicus suggest that the resolution modifies or abrogates the local rule because it omits any reference to certain permitted or potentially permitted uses (e.g., the deployment of security cameras; the photographing of naturalization proceedings). We reject this suggestion. The resolution is a broad statement that approves and endorses the way in which district courts within the circuit were then (and are now) handling the sensitive issue of the threatened intrusion of television and radio technologies into the courtroom. There is no indication that the resolution was in any way aimed at altering existing practice.

council and demonstrates its reading of Local Rule 83.3. Thus, even if the resolution was deficient in some technical sense, its existence nonetheless would support a narrow interpretation of Local Rule 83.3.

Either way, the resolution is powerful evidence of the meaning and purport of the local rule. The First Circuit Judicial Council followed the Judicial Conference's lead and made its position abundantly clear. We hardly think that a district court within the circuit would have stood silently by if it believed that the circuit council had misread its local rule.

In this case, then, all roads lead to Rome. It is perfectly clear that the local rule, the Judicial Conference policy, and the circuit council resolution are cut from the same cloth. We think that they must be construed in pari materia. Separately and collectively, the three statements undermine the district judge's assertion of authority to allow webcasting.

The respondent has an odd rejoinder to the combined force of the local rule, the Judicial Conference policy, and the circuit council resolution. He suggests that reading these offerings together to deny all discretion to a trial judge to permit Internet access to her courtroom unlawfully burdens a litigant's right to a public trial in the federal courts.

The respondent bases this suggestion on the Supreme Court's decision in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980). That decision confirms the public's right to attend trials, id. at 574, 100 S.Ct. 2814 (opinion of Burger, C.J., joined by White and Stevens, JJ.). While the new technology characteristic of the Information Age may call for the replotting of some boundaries,

the venerable right of members of the public to attend federal court proceedings is far removed from an imagined entitlement to view court proceedings remotely on a computer screen. Because there is no hint here that any portion of the proceedings will be closed to the public, the *Richmond Newspapers* right is not in jeopardy.

Next, we must examine a possible semantic loophole, emphasized by the respondent during oral argument. At first blush, it is not obvious that either the Judicial Conference policy or the First Circuit Judicial Council resolution covers the situation at hand. After all, the policy speaks pertinently in terms of "televising" and the resolution speaks pertinently in terms of "radio and television coverage" of district court proceedings. Because neither of them say anything about Internet transmittals, the respondent posits that webcasting is different in kind from the array of proscribed techniques (and, thus, not affected by either the policy or the resolution).

On close perscrutation, that contention comes to naught. The difference between televising and webcasting is one of degree rather than kind. Both are broadcast mediums. The absence of a specific reference to webcasting is not telling; both at the time when the policy was promulgated and at the time when the resolution was adopted, Internet webcasting had not attained the ubiquity that currently prevails. What is more significant is that the intention of both the Judicial Conference, and the circuit council is transparently clear. That intention is to forbid all broadcasting of federal district court proceedings in civil cases, save only for the enumerated exceptions. The webcasting

that the district court authorized contravenes that intention.

The sockdolager lies in the text of D. Mass. R. 83.3. The local rule is broader in its prohibitions than either the policy or the resolution. In terms, it forbids the making of "any broadcast by radio, television, or other means ...." D. Mass. R. 83.3(a) (emphasis supplied). Thus, the rule bars more than conventional television broadcasting. Webcasting plainly falls within its scope.

IV. CONCLUSION

We are mindful that good arguments can be made for and against the webcasting of civil cases. We are also mindful that emerging technologies eventually may change the way in which information-including information about court cases-historically has been imparted. Yet, this is not a case about free speech writ large, nor about the guaranty of a fair trial, nor about any cognizable constitutional right of public access to the courts. Our purview here is much more confined: this is a society dedicated to the rule of law; and if a controlling rule, properly interpreted, closes federal courtrooms in Massachusetts to webcasting and other forms of broadcasting (whether over the air or via the Internet), we are bound to enforce that rule. In the last analysis, this boils down to a case about the governance of the federal courts.

We need go no further. For the reasons elucidated above, we conclude that the district court's order of January 14, 2009, which purposed to permit webcasting of a motions hearing in a civil case, was based on a

palpably incorrect interpretation of D. Mass. R. 83.3. Consequently, we exercise our advisory mandamus authority, prohibit enforcement of the challenged order, and remand the case for further proceedings consistent with this opinion.

Petition granted.

APPENDIX A

Rule 83.3
Photographing, Recording and Broadcasting

(a) Recording and Broadcasting Prohibited. Except as specifically provided in these rules or by order of the court, no person shall take any photograph, make any recording, or make any broadcast by radio, television, or other means, in the course of or in connection with any proceedings in this court, on any floor of any building on which proceedings of this court are or, in the regular course of the business of the court, may be held. This prohibition shall apply specifically but shall not be limited to the second, third, ninth, eleventh, twelfth, thirteenth, fifteenth, sixteenth, eighteenth, nineteenth and twentieth floors of the John W. McCormack Post Office and Courthouse Building in Boston and the fifth floor of the Courthouse Building in Springfield.

(b) Voice Recordings by Court Reporters. Official court reporters are not prohibited by section (a) from making voice recordings for the sole purpose of discharging their official duties. No recording made for that purpose shall be used for any other purpose by any person.

(c) The court may permit (1) the use of electronic or photographic means for the preservation of evidence or the perpetuation of a record, and (2) the broadcasting, televising, recording, or photographing of investitive, ceremonial, or naturalization proceedings.

(d) The use of dictation equipment is permitted in the clerk's office of this court by persons reviewing files in that office.

APPENDIX B

A judge may authorize broadcasting, televising, recording, or taking photographs in the courtroom and in adjacent areas during investitive, naturalization, or other ceremonial proceedings. A judge may authorize such activities in the courtroom or adjacent areas during other proceedings, or recesses between such other proceedings, only:

(a) for the presentation of evidence;

(b) for the perpetuation of the record of the proceedings;

(c) for security purposes;

(d) for other purposes of judicial administration; or

(e) for the photographing, recording, or broadcasting of appellate arguments.

When broadcasting, televising, recording, or photographing in the courtroom or adjacent areas is permitted, a judge should ensure that it is done in a manner that will be consistent with the rights of the parties, will not unduly distract participants in the proceeding, and will not otherwise interfere with the administration of justice.

APPENDIX C

It is hereby resolved by the Judicial Council of the First Circuit, in response to the urging of the Judicial Conference of the United States at its March 1996 Meeting, to continue to bar the taking of photographs and radio and television coverage of proceedings in the United States district courts within the circuit, except as otherwise provided for ceremonial occasions.

LIPEZ, Circuit Judge, concurring.

For the reasons set forth so clearly in Judge Selya's opinion, I agree with my colleagues that the district court palpably erred in its application of Local Rule 83.3 of the District of Massachusetts to the request of respondent Tenenbaum that Courtroom View Network be permitted to webcast the non-evidentiary motions hearing that was scheduled for January 22, 2009. Given the language of the rule, and the unmistakable grounding of that language in a policy adopted by the Judicial Conference of the United States, that request should have been denied.

However, this inescapable legal conclusion does not discredit the policy concerns that animated, at least in part, the district court's decision. Indeed, in my view, there are no sound policy reasons to prohibit the webcasting authorized by the district court. Therefore, this case calls into question the continued relevance and vitality of a rule that requires such a disagreeable outcome.

When the motions hearing at issue occurs, only

those physically present in the courtroom will hear the parties debate the merits of the motions before the district court. Ironically, however, almost immediately after the oral argument in this First Circuit mandamus proceeding ended, anyone with an internet connection could access a recording of that argument from our website. There is no meaningful difference between the type of oral argument that we make available to the public as a matter of course and the type of argument that would have been broadly accessible under the district court's Order. *See Capitol Records, Inc. v. Alaujan*, 593 F.Supp.2d 319, 322 (D.Mass.2009) (limiting the applicability of the Order in this case permitting narrowcasting to a motion hearing that would have "involve[d] only legal argument"). There are significant losses in this discrepancy.

"Courts have long recognized 'that public monitoring of the judicial system fosters the important values of quality, honesty and respect for our legal system.' " *In re Providence Journal Co.*, 293 F.3d 1, 9 (1st Cir.2002) (quoting *Siedle v. Putnam Inv.*, 147 F.3d 7, 10 (1st Cir.1998)). In our democratic society, "the knowledgeable tend to be more robustly engaged in public issues," and "[i]nformation received by direct observation is often more useful than that strained through the media. Actually seeing and hearing court proceedings, combined with commentary of informed members of the press and academia, provides a powerful device for monitoring the courts." *Hamilton v.*

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[1] Rule 53 of the Federal Rules of *Criminal* Procedure prohibits "the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom." Fed.R.Crim.P. 53 (emphasis added).

Accu-Tek, 942 F.Supp. 136, 138 (E.D.N.Y.1996).

Moreover, webcasting the legal arguments of counsel in a civil motions hearing does not implicate the concerns raised by televised trials.[1] Many judges worry that the presence of cameras in the courtroom and the enhanced publicity that cameras bring changes the nature of the trial process itself. Those fears do not realistically apply to a civil motions hearing where the judge considers and responds to the arguments of counsel. Also, there is no reason to fear the impact of webcasting on any future jury trial in this case. Trial judges can assure the seating of a fair and impartial jury with the application of familiar jury selection practices.

The Local Rule at the center of this controversy was adopted in 1990. Since its adoption, dramatic advances in communications technology have had a profound effect on our society. These new technological capabilities provide an unprecedented opportunity to increase public access to the judicial system in appropriate circumstances. They have also created expectations that judges will respond sensibly to these opportunities. With its sweeping prohibition on the broadcasting or recording of district court proceedings, Local Rule 83.3 prevents such responses in civil cases. So too do the Policy of the Judicial Conference and the Resolution of the Judicial Council of the First Circuit that underlie the Local Rule. As the outcome of this proceeding demonstrates, the Rule, the Policy, and the Resolution should all be reexamined promptly.

593 F. Supp. 2d 319

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CAPITOL RECORDS, INC., et al., Plaintiffs,
v.
Noor ALAUJAN, Defendant.

Sony BMG Music Entertainment, et al., Plaintiffs,
v.
Joel Tenenbaum, Defendant.

Civ. Act. Nos. 03-cv-11661-NG, 07-cv-11446-NG.
Jan. 14, 2009.

ORDER RE: MOTION TO RECORD AND NARROWCAST HEARING

GERTNER, District Judge:

The Defendant's Motion to Permit Audio-Visual Coverage by the Courtroom View Network ("CVN") (document # 718) of the January 22, 2009, hearing over a secure internet connection is **GRANTED**. CVN will "narrowcast" the audio-visual coverage to the website of the Berkman Center for Internet and Society, which will make the recording publicly available for all non-commercial uses via its website.

I. INTRODUCTION

This case, like many others now before the Court, is one for copyright infringement under 17 U.S.C. §

106. The Plaintiffs are some of the nation's largest record companies. The Defendants in these consolidated cases are individual computer users-mainly college students-who, the Plaintiffs claim, used "peer-to-peer" file-sharing software to download and disseminate music without paying for it, infringing the Plaintiffs' copyrights. Many of the Defendants have defaulted or settled, largely without the benefit of counsel, subject to damages awards between $3,000 and $10,000.

Joel Tenenbaum ("Tenenbaum") is one of the few defendants represented by counsel, Professor Charles Nesson of Harvard Law School and the Berkman Center for Internet and Society. He has chosen to challenge the action through a Motion to Amend Counterclaims (document # 686), his Opposition to the Plaintiffs' Motion to Dismiss Counterclaims (document # 676), and a Motion to Join the Recording Industry Association of America ("RIAA") (document # 693), all of which will be heard on January 22, 2009. Whether those counterclaims survive or not, he will proceed to a jury trial in this Court currently scheduled for March 30, 2009. While Tenenbaum's Motion to Permit Audio-Visual Coverage by CVN (document # 718) is directed to all proceedings going forward, this Order addresses only the proceeding on January 22, 2009, where legal arguments on the motions above will be heard.

In many ways, this case is about the so-called Internet Generation-the generation that has grown up with computer technology in general, and the internet in particular, as commonplace. It is reportedly a generation that does not read newspapers or watch the evening news, but gets its information largely, if not almost exclusively, over the internet. *See generally*

Martha Irvine, *Generation Raised Internet Comes of Age*, MSNBC.com, Dec. 13, 2004, http://www.msnbc.msn.com/id/6645963/. Consistent with the nature of these file-sharing cases, and the identity of so many of the Defendants, this case is one that has already garnered substantial attention on the internet.

While the Plaintiffs object to the narrowcasting of this proceeding, see Pl. Resp. to Mot. to Allow CVN to Provide Coverage (document # 728), their objections are curious. At previous hearings and status conferences, the Plaintiffs have represented that they initiated these lawsuits not because they believe they will identify every person illegally downloading copyrighted material. Rather, they believe that the lawsuits will deter the Defendants and the wider public from engaging in illegal file-sharing activities. Their strategy effectively relies on the publicity resulting from this litigation.[1]

Nothing in the local rules of the District Court of Massachusetts, the policies of the Judicial Council for the First Circuit, life, or logic suggests that this motion should be denied. As Judge Weinstein noted: "No reason has been suggested to depart from the policy that, in general, the public should be permitted and encouraged to observe the operation of its courts in the most convenient manner possible, so long as there is no interference with the due process, the dignity of the litigants, jurors, and witnesses, or with other

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[1] It is possible the Plaintiffs have now changed their minds about the virtues of this strategy. *See* Sarah McBride and Ethan Smith, Music Industry to Abandon Mass Suits, Wall St. J., Dec. 19, 2008, available at *http://online.wsj.com/article/SB122966038836021137.html*.

appropriate aspects of the administration of justice." *In re Zyprexa Products Liability Litigation*, 2008 WL 1809659 (E.D.N.Y. Mar. 4, 2008) (citing Diane L. Zimmerman et al., *Let the People Observe Their Courts*, 61 Judicature 156 (1977)); *see also* Robert Barnes, *A Renewed Call To Televise High Court*, Wash. Post, February 12, 2007 at A15 ("The two newest justices, Roberts and Samuel A. Alito Jr., sounded open to the possibility during their confirmation hearings, and Alito favored allowing cameras in his previous job as an appellate court judge.").

Much like the proceedings before then-Judge Alito and audio-visual coverage of legal arguments in Courts of Appeals around the country, the district court hearing now at issue involves only legal argument. Moreover, coverage will be "gavel to gavel"—streaming a complete recording of the hearing to a publicly available website-not edited for an evening news soundbite. The public benefit of offering a more complete view of these proceedings is plain, especially via a medium so carefully attuned to the Internet Generation captivated by these file-sharing lawsuits.

II. DISCUSSION

Local Rule 83.3(a) permits the recording and broadcast of courtroom proceedings in certain circumstances expressly enumerated in the Local Rules, see D. Mass. Local R. 83.3(a)-(d), or "by order of the court."[2] As written, this residual clause does not carry any limitation; instead, it assigns the decision to

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[2] Local Rule 83.3 provides in relevant part:

(a) Recording and Broadcasting Prohibited. Except as specifi-

permit recording or broadcast to the discretion of the presiding district court judge.

The Court believes that the upcoming motion hearing is an instance where recording and broadcast falls squarely within the public interest. The First Amendment suggests that court proceedings be open to the public "whenever practicable." *In re Zyprexa Products Liability Litigation*, 2008 WL 1809659 (E.D.N.Y. Mar. 4, 2008) (permitting recording of district court proceedings). As the Supreme Court noted in *Craig v. Harney*, 331 U.S. 367, 374, 67 S.Ct. 1249, 91 L.Ed. 1546 (1947), "[a] trial is a public event. What transpires in the courtroom is public property."

"Public" today has a new resonance, especially in this case. The claims and issues at stake involve the internet, file-sharing practices, and digital copyright protections. The Defendants are primarily members

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cally provided in these rules or by order of the court, no person shall take any photograph, make any recording, or make any broadcast by radio, television, or other means, in the course of or in connection with any proceedings in this court, on any floor of any building on which proceedings of this court are or, in the regular course of the business of the court, may be held....

(b) Voice Recordings by Court Reporters. Official court reporters are not prohibited by section (a) from making voice recordings for the sole purpose of discharging their official duties. No recording made for that purpose shall be used for any other purpose by any person.

(c) The court may permit (1) the use of electronic or photographic means for the preservation of evidence or the perpetuation of a record, and (2) the broadcasting, televising, recording, or photographing of investitive, ceremonial, or naturalization proceedings.

(d) The use of dictation equipment is permitted in the clerk's office of this court by persons reviewing files in that office.

Effective September 1, 1990.

of a generation that has grown up with the internet, who get their news from it, rather than from the traditional forms of public communication, such as newspapers or television. Indeed, these cases have generated widespread public attention, much of it on the internet. Under the circumstances, the particular relief requested—"narrowcasting" this proceeding to a public website—is uniquely appropriate.

The Defendant has assured the Court that the recording and narrowcast of the January 22, 2009, hearing will be publicly available for all non-commercial uses via the Berkman Center's website at *http://cyber.law.harvard.edu/*. The January 22, 2009, hearing will include only oral argument by the attorneys representing the parties—no criminal defendants, jurors, or witnesses will be exposed to public view.[3] In fact, CVN intends to use unobtrusive cameras already installed in the courtroom, diminishing the likelihood that the recording will disrupt the Court's business. The coverage will be gavel-to-gavel, meaning that the Berkman Center will not edit the videostream in any way. Given the nature of this particular hearing, few factors counsel against allowing the proceeding to be broadcast, while the public has much to gain.

The Court recognizes that, despite a three-year

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[3] Moreover, the Court does not believe that prospective jurors are any more likely to be prejudiced by allowing the hearing to be recorded and made publicly available. As the Court has noted, this case has already generated widespread media attention quite aside from any courtroom recording. Should the case reach trial, jurors will be instructed to refrain from conducting any outside research into the litigation, exactly as they are already prohibited from accessing media accounts or other external sources of information.

experiment with courtroom cameras in the 1990s, the Judicial Conference continues to oppose the recording of district court proceedings in all but a narrow set of circumstances. *See* Administrative Office of the U.S. Courts, *Guide to Judiciary Polices and Procedures*, Vol. 1, Ch. 3, Part E.3.[4] The Conference permits the broadcast of oral arguments in Courts of Appeals, at the discretion of the Court, but not analogous proceedings—oral arguments—in district court. *See News Release: Judicial Conference Acts on Cameras in Court*, Administrative Office of the U.S. Courts, Mar. 12, 1996 (document # 720-14). Although entitled to considerable weight, the position of the Judicial Conference opposing televised district court proceedings does not bind this Court. *See, e.g., United States v. Merric*, 166 F.3d 406, 412 (1st Cir. 1999) (noting that "the views of the Judicial Conference are entitled to respectful attention," but are binding only on a few matters); *In re Cargill, Inc.*, 66 F.3d 1256, 1267 (1st Cir. 1995).

Pursuant to their own local rules, a number of individual district court judges in the Eastern and

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[4] The Judicial Conference policy statement only permits recording and broadcasting during "investitive, naturalization, or other ceremonial proceedings," or for (1) the presentation of evidence; (2) the perpetuation of the record of proceedings; (3) security purposes; (4) other purposes of judicial administration; and (5) the photographing, recording or broadcasting of appellate arguments The policy statement appears to all but disregard the substantial similarity between appellate argument, which it allows to be broadcast, and a motion hearing before the district court. Both involve only oral argument by counsel; neither type of proceeding risks placing jurors, witnesses, or criminal defendants before courtroom cameras.

Southern District of New York have allowed specific hearings in civil cases to be recorded and broadcast since at least 1996. See E.D.N.Y. & S.D.N.Y. Civ. R. 1.8; *Marisol A. v. Giuliani*, 929 F.Supp. 660 (S.D.N.Y.1996) (Ward, J.); *Sigmon v. Parker Chapin Flattau & Klimpl*, 937 F.Supp. 335 (S.D.N.Y.1996) (Leisure, J.); *Katzman v. Victoria's Secret Catalogue*, 923 F.Supp. 580 (S.D.N.Y.1996) (Sweet, J.); *Hamilton v. Accu-Tek*, 942 F.Supp. 136 (E.D.N.Y.1996) (Weinstein, J.); *GVA Market Neutral Master Limited v. Veras Capital Partners*, No. 07-cv-00519 (S.D.N.Y.); *CCM Pathfinder Pompano Bay, LLC v. Compass Financial Partners LLC, et. al.*, No. 08-cv-05258 (S.D.N.Y.); *In re Zyprexa Products Liability Litigation*, 2008 WL 1809659 (E.D.N.Y.) (Weinstein, J.).

Indeed, after the *Marisol* case, in which Judge Ward permitted CVN coverage of a proceeding, the Judicial Conference approved a resolution in March 1996 "to strongly urge each circuit judicial council to adopt" Conference policy banning cameras, and to "abrogate any rules of court" that conflict with that policy. *See* 929 F.Supp. 660; *News Release: Judicial Conference Acts on Cameras in Court*, Administrative Office of the U.S. Courts, Mar. 12, 1996 (document # 720-14). To date, no circuit judicial council—including the First Circuit judicial council which binds this Court—has done so.[5]

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[5] Much to the contrary, Congress has recently taken up legislation that would reverse Judicial Conference policy and allow cameras in the courtroom on a far more routine basis. *See* Sunshine in the Courtroom Act of 2008, S. 352, 110th Cong. (as reported by the S. Comm. on the Judiciary); Sunshine in the Courtroom Act of 2007, H.R. 2128, 110th Cong. (as reported by the H. Comm. on the Judiciary).

Nothing indicates that the integrity of the proceedings or the interests of any party have been prejudiced by the use of courtroom cameras in these cases. The Plaintiffs' concern here that jurors will be prejudiced by internet coverage is specious. The judicial system relies on voir dire to ferret out those jurors who have followed a case, whether it be through newspapers, television, or now, the internet. The judicial system likewise relies on the good faith of jurors not to perform research about a case in any media format or other medium. Going forward, the Court will add an admonition about the internet to address concerns about juror exposure to previous coverage of the case, of whatever variety.

Under these circumstances and with the discretion afforded by Local Rule 83.3(a), the Court believes it is fully appropriate to allow the public a wider window into the judicial proceeding at hand.

III. CONCLUSION

Based on the foregoing analysis, the Court **GRANTS** the Defendant's motion to allow CVN to record and narrowcast the January 22, 2009 hearing (document # 718), subject to the following conditions:

1. This Order is limited to the January 22, 2009, hearing; the Court will address any further "narrowcasting" should that be necessary;

2. The CVN narrowcast is the only recording of the hearing allowed-no other private recording or broadcast, whether audio or visual, is permitted;

3. The Berkman Center for Internet and Society

will act as a subscriber to the CVN narrowcast and will make the recording publicly available for all non-commercial uses via its website;

4. CVN will use the cameras already installed in Judge Gertner's courtroom (Courtroom 2), as indicated by Attorney Nesson at the January 13, 2009, telephonic conference;

5. The "narrowcast" will be gavel-to-gavel, with no editing by CVN or the parties; and

6. CVN will immediately contact Chris Gross, the Court's IT specialist, at chris_gross@mad.uscourts.gov to coordinate the narrowcast feed from the courtroom cameras.

SO ORDERED.

Unpublished
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CAPITOL RECORDS, INC., et al., Plaintiffs,
v.
Noor ALAUJAN, Defendant.

Sony BMG Music Entertainment, et al., Plaintiffs,
v.
Joel Tenenbaum, Defendant.

Civ. Act. Nos. 03-cv-11661-NG, 07-cv-11446-NG.
Jan. 20, 2009.

ORDER RE: MOTION TO STAY

GERTNER, District Judge:

The Plaintiffs' Motion to Stay (document # 733) is **GRANTED** in part and **DENIED** in part. The motion is denied to the extent that it seeks an unlimited stay of the hearing scheduled for January 22, 2009. The Court, however, will postpone the hearing until **February 24, 2009** for the reasons stated below.

The Court grants a limited continuance, first and foremost, because there is no emergency related to the hearing originally slated for January 22, 2009. The motions set for argument at the hearing raise legal issues which can be properly addressed at a later date. Just as importantly, postponing the hearing will allow the First Circuit an opportunity to fully consider the petition before it, particularly because a number of

claims presented in the petition for mandamus were never raised in their current form in the district court. Indeed, several of the Plaintiffs' claims involve questions of "how" the recording will be made and distributed and not "whether" the hearing can be recorded under Local Rule 83.3:

1. With respect to the Plaintiffs' objections about who will record the proceedings, these matters can be readily addressed. The Court's Order permitted the Courtroom View Network ("CVN") to provide audio-visual coverage of a single upcoming hearing. CVN is a private company that regularly records courtroom proceedings for various subscribers; it is not a party in this case. See Decl. of John Shin at ¶ 4 (document # 719) (stating that CVN has covered more than 200 proceedings in courtrooms around the country); see, e.g., In re Zyprexa Products Liability Litigation, 2008 WL 1809659 (E.D.N.Y. Mar. 4, 2008); E*Trade Financial Corp. v. Deutsche Bank AG, 582 F.Supp.2d 528 (S.D.N.Y. Oct 14, 2008); Nov. 26, 2007 Order, GVA Market Neutral Master Limited v. Veras Capital Partners, No. 07-cv-00519 (S.D.N.Y.). Neither the Plaintiffs nor the Defendant specifically proposed another entity -- either non-profit or for-profit -- to record the proceedings. As a result, the Court authorized only CVN, making clear that its Order did not permit any and all recordings, but only the recording specifically presented for the Court's approval.

2. The question of where and how CVN's recording is made available on the internet is a separate but related issue. Because CVN offers a "narrowcast" service, its recordings are generally only available to subscribers -- i.e., those who pay for access to CVN's re-

cording. Because of this ability to limit viewers, CVN audiences vary according to the explicit directions of the presiding judge. In this case, the Court has sought to ensure that the audio-visual recording is publicly available for all non-commercial uses. In response, the Defendant proposed that the Berkman Center for Internet and Society would act as a subscriber to the CVN recording and would make that recording publicly available on its website. In the absence of a counter-proposal from the Plaintiffs, the Court accepted this arrangement, allowing to Berkman Center to host the video recording so long as it was not edited and provided gavel-to-gavel coverage.

3. The Order, however, did not limit the availability of the recording to the Berkman Center's website. The Plaintiffs are also free to subscribe to the CVN recording and to make it available to the public at a website of their choosing, subject to the same conditions.

4. If there are further issues with respect to the way in which theBerkman Center presents the video recording, those concerns can surely be addressed. They do not go to the question of "whether" a recording of this hearing should be made available to the public, but "how."

SO ORDERED.

Unpublished
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

IN RE SONY BMG MUSIC ENTERTAINMENT ET AL., PETITIONERS.

No. 09-1090.
Entered April 30, 2009.

Before Lynch, Chief Judge,
Torruella, Selya, Boudin*, Lipez and Howard, Circuit Judges.

ORDER OF COURT

Pursuant to First Circuit Internal Operating Procedure X(C), the petition for rehearing en banc has also been treated as a petition for rehearing before the original panel. The petition for rehearing having been denied by the panel of judges who decided the case and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and petition for rehearing en banc be denied.

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* Judge Boudin is recused and did not participate in the consideration of this matter.

UNITED STATES CONSTITUTION

Amendment I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment V. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.